United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4226

75-4226

To be argued by
MARY P. MAGUIRE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4226

PARSAM SRI THAKUR and VELLAMA SRI THAKUR,

Petitioners,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition to Review an Order of
the Board of Immigration Appeals

RESPONDENT'S BRIEF

ROBERT J. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

CASES CITED

STATEMENT OF THE ISSUE

DID THE BOARD OF IMMIGRATION APPEALS ABUSE ITS DISCRETIONARY AUTHORITY BY DECLINING TO REOPEN THE DEPORTATION PROCEEDINGS TO PERMIT THE PETITIONERS TO REAPPLY FOR THE PRIVILEGE OF VOLUNTARY DEPARTURE

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Parsram Sri Thakur and Vellama Sri Thakur (hereinafter the "petitioners"), petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on September 29, 1975. That order dismissed the petitioners' appeal from an order of an Immigration Judge which denied the petitioners' motion to reopen their deportation proceedings in order to reapply for the privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). The Board affirmed the decision of the Immigration Judge who based his decision on the fact that petitioners had shown no compelling reason or circumstance for their

failure to depart within the four-month period of voluntary departure originally granted to them.

STATEMENT OF FACTS

Petitioners, a married couple, are natives and citizens of Guyana. Petitioner Thakur Parsram Thakur last entered* the United States on September 2, 1970 as a nonimmigrant visitor for pleasure. On February 17, 1971 his application to change his nonimmigrant status from that of a tourist to that of a student was granted. He was granted several extensions of his student status until November 5, 1974. At that time he was denied a further extension and was directed to depart by November 15, 1974 (Exhibit 1 of Petitioners' Brief). Petitioner Vellama Sri Thakur had been admitted to the United States on June 16, 1971 as the spouse of a nonimmigrant student and she maintained that status during the period her husband maintained his status as a nonimmigrant student.

---

*The male petitioner had previously been in the United States from September 1960 through September 1964. During that period of time he received his B.A. degree from the University of Wisconsin and his M.A. degree from North Colorado University.

Thus, when the male petitioner's application for an extension of his student status was denied on November 5, 1974 her status as the spouse of a nonimmigrant student was terminated and she, too, was directed to depart by November 15, 1974.

Neither petitioner departed as directed and on February 10, 1975 deportation proceedings were instituted by the issuance of orders to show cause and notices of hearings (T.11).* At a deportation hearing held on February 27, 1975 the petitioners conceded their deportability (T. 10, p. 2) and requested the privilege of voluntary departure in lieu of deportation. The male petitioner stated that he expected to complete work on his doctorate in educational psychology in June 1975 and, on the basis of that representation, the Immigration Judge granted petitioners a period of four months until June 27, 1975 to effect their voluntary departure. The

---

*References preceded by the letter "T" are to tabs affixed to the Certified Administrative Record previously filed with the Court.

Immigration Judge also entered an alternate order of deportation to Guyana in the event that the aliens failed to voluntarily depart by the prescribed date (T. 9).

On June 24, 1975 petitioners, by counsel, submitted a motion to reopen their deportation proceedings to grant them voluntary departure anew in order to enable the male petitioner to complete practical training as a psychologist (T. 5). By order dated August 19, 1975 the Immigration Judge denied the motion to reopen on the ground that they had shown no compelling reason or circumstance for their failure to depart within the time originally granted (T. 3).

Petitioners appealed the decision of the Immigration Judge to the Board of Immigration Appeals and by a decision and order dated September 29, 1975 the Board affirmed the decision of the Immigration Judge and dismissed the appeal (T. 1).

The petitioners then filed this petition for review on October 23, 1975 seeking review of the

Board's order and, in the process, gaining an automatic stay of deportation pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

RELEVANT STATUTE

Immigration and Nationality Act of 1952, as amended:

Sec. 244, 8 U.S.C. §1254 -

* * *

> (e) The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * *

RELEVANT REGULATION

Title 8, Code of Federal Regulations (CFR):

§103.5 Reopening or reconsideration.

> Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon a motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision . . . A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material.

* * *

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY BY DECLINING TO REOPEN THE DEPORTATION PROCEEDINGS TO PERMIT THE ALIENS TO REAPPLY FOR THE PRIVILEGE OF VOLUNTARY DEPARTURE

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act;* has

*Section 103(a) of the Act, 8 U.S.C. §1103(a).

of the parties a list of all documents, transcripts

promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. §242.22, provides in pertinent part that motions to reopen "will not be granted unless the Special Inquiry Officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally, 8 C.F.R. §103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. §3.8.

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the motion to reopen is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a

grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by these petitioners and the evidence they offered in support of their motion.

B. The privilege of voluntary departure

The Attorney General is authorized by Section 244(e) of the Act, 8 U.S.C. §1254(e), to grant the privilege of voluntary departure to an otherwise deportable alien as a matter of discretion.* The only statutory requirement for eligibility under this provision is that the alien establish that he is and has been a person of good moral character for at least five years immediately preceding his application. The Attorney General has set forth standards in 8 C.F.R. §244.1 under which an application for voluntary departure will be

---

*The privilege is normally granted initially by the Immigration Judge at the deportation hearing. The District Director may informally extend or reinstate it under 8 C.F.R. 244.2, or the alien may move the Immigration Judge to reopen the proceedings to apply for reinstatement upon a showing of changed circumstances.

considered. This regulation provides that the Immigration Judge in his discretion may grant voluntary departure if the alien "establishes that he is willing and has the immediate means with which to depart promptly from the United States."

The petitioners' original application for voluntary departure was granted by the Immigration Judge who generously complied with the male petitioner's request that he be given sufficient time to complete his doctorate. Accordingly, the only issue presented by the petitioners' motion to reopen was whether their motion was supported by newly-discovered evidence sufficient to warrant the grant of the relief sought.

C. Petitioners did not establish that their application was based on circumstances which had changed since their earlier deportation proceeding.

In the affidavit of petitioner Parsram Sri Thakur submitted in support of the motion to reopen (T. 6), the petitioners did not set forth a single circumstance which had changed since the earlier proceedings, except to

say that the male petitioner had completed his doctorate course and required a one year period of practical training in order to be licensed as a psychologist. Petitioners did not allege any particular equity in their favor to warrant the grant of this discretionary relief.

Petitioners concede that the motion to reopen showed no compelling reasons for their failure to depart (Petitioners' brief, p. 6). They contend, however, that such reasons existed and that it was through the fault of petitioners' prior counsel that the reasons were not sufficiently given.* It is submitted that such contention is totally without merit. Petitioners were represented by an experienced immigration lawyer. Both petitioners are English speaking and the male petitioner has a

---

*Petitioners' contention that the certified record of the deportation proceedings is incomplete is totally without merit. The denial of the male petitioner's application for an extension of his student status was a decision made by the District Director and was not made in a deportation proceeding pursuant to Section 242 of the Act. The denial of that application is not subject to review in this Court on direct petition for review under Section 106 of the Act. Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206 (1968).

doctorate degree in psychology. It is submitted that the failure to present compelling reasons was not due to the alleged incompetency of petitioners' former counsel but rather to the fact that such compelling reasons do not exist. Even now petitioners do not present one scintilla of evidence which could be considered a compelling reason.

D. The denial of the motion to reopen was a proper exercise of discretion.

The sole issue before this Court is whether the Board abused its discretionary authority by declining to reopen the deportation proceedings. The grant or denial of a motion to reopen is a matter vested within the sound discretion of the Board. Novinc v. Immigration and Naturalization Service, 371 F.2d 272 (7th Cir. 1967). The scope of review by this Court is extremely narrow. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969). The Board's decision should not be overturned unless there has been a clear abuse of discretion.

The grant of voluntary departure pursuant to Section 244(e) of the Act is a privilege that may be awarded to deserving but deportable aliens. Like other ameliorative features in the immigration laws, it is a benefit that may be granted or withheld in the sound discretion of the Attorney General and his authorized delegates. Bartsch v. Watkins, 175 F.2d 245 (2d Cir. 1949); Diric v. Immigration and Naturalization Service, 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015 (1969). Although an alien has a right to a discretionary determination, the granting of the privilege is not a matter of right but of administrative grace. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957). In order to warrant the favorable exercise of discretion, the alien must establish in good faith that he is willing and able to depart promptly from the United States.

We submit that the decision of the Board was a sound exercise of discretion. Since the petitioners failed to offer evidence which would warrant a grant of relief sought at a reopened hearing, the denial of their

motion cannot be said to have been an abuse of discretion. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

CA 75-4226

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of March, 1976 she served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Edith Lowenstein, Esq.,
36 West 44th St.
NY NY 10036

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

2nd day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292638 Queens County
Term Expires March 30, 1977